STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL FRANCIS SPITZLEY, and
THE ESTATE OF DAVID SPITZLEY,

Plaintiffs-Appellees,

vs.

THOMAS P. SPITZLEY and
KIMBERLY S. SPITZLEY,

Defendants-Appellants.

Supreme Court No.: 130585

Court of Appeals
No.: 255345

Clinton Circuit No.:
2003-009578-CZ

130585

PLAINTIFFS' SUPPLEMENTAL BRIEF ON APPEAL TO THE SUPREME COURT

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STANDARD OF REVIEW

"A Trial Court's finding that an action is frivolous is reviewed for clear error. A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

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DATE AND NATURE OF ORDERS BEING APPEALED

February 7, 2006	Court of Appeals Order Denying Motion for Reconsideration
December 1, 2005	Court of Appeals Order Affirming Trial Court Order Imposing Sanctions
April 15, 2004	Circuit Court Order Awarding Sanctions and Costs

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QUESTION PRESENTED

ISSUE

I. WHETHER ANY OF THE MICHIGAN AUTHORITY DEFENDANTS ASSERTED BELOW SUPPORTED THEIR POSITION THAT THEY WERE ENTITLED TO THE DISPUTED 40-ACRE PARCEL OF FARMLAND.

Plaintiffs would answer, ... "No"

Defendants would answer, ... "Yes"

Trial Court would answer, ... "No"

Court of Appeals would answer, ... "No"

II. WHETHER THE NON-MICHIGAN AUTHORITY ON WHICH DEFENDANTS RELIED IN THEIR COUNTER-COMPLAINT PRESENT A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW, MCR 2.114(D).

Plaintiffs would answer, ... "No"

Defendants would answer, ... "Yes"

Trial Court would answer, ... "No"

Court of Appeals would answer, ... "No"

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III. WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT "DEFENDANTS HAVE NOT PRESENTED . . . ANY DOCUMENTARY EVIDENCE THAT SUPPORTS THEIR POSITION"

Plaintiffs would answer, ... "Yes"

Defendants would answer, ... "No"

Trial Court would answer, ... "Yes"

Court of Appeals would answer, ... "Yes"

IV. WHETHER SANCTIONS WERE PROPERLY AWARDED AGAINST DEFENDANTS PURSUANT TO MCR 2.114(E)

Plaintiffs would answer, ... "Yes"

Defendants would answer, ... "No"

Trial Court would answer, ... "Yes"

Court of Appeals would answer, ... "Yes"

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STATEMENT OF APPELLATE JURISDICTION

Defendants allege that the issue involves legal principles of major significance to the State's jurisprudence pursuant to MCR 7.302(B)(3), and that the Court of Appeals' decision is clearly erroneous and will cause material injustice, pursuant to MCR 7.302(B)(5).

Plaintiffs acknowledge that the Application for Leave was filed within forty-two days after the Court of Appeals clerk mailed notice of the Order Denying the Motion for Re-Hearing.

Plaintiffs affirm that the Court of Appeals decisions uphold long-established Michigan jurisprudence with regard to real property transfers and the appropriate imposition of sanctions. Therefore, the requirements of MCR 7.302(B)(3) and (5) are not met by the Application for Leave to Appeal.

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COUNTER STATEMENT OF PROCEEDINGS AND FACTS

In May of 2003, the Plaintiffs, Michael Spitzley and the Estate of David Spitzley, filed a Complaint to Remove Cloud on Title of a 40-acre parcel of property and Reformation of the Personal Representative's Deed, which had incorrectly included a metes and bounds description of a 40-acre parcel not owned by the Estate.

Defendants filed an Answer and Counter-Complaint and a hearing was held on competing motions for summary disposition in October of 2003.

Prior to his death, the Decedent had deeded the disputed 40-acre parcel to himself and his son, Michael Spitzley, as joint tenants with rights of survivorship. The current state of the title to the disputed 40-acre parcel was evidenced by a Quit Claim Deed from the Decedent to himself and his son, Michael Spitzley, which was recorded on December 26, 2001.

At the hearing on the competing motions for summary disposition, the Court held that the Estate could not transfer the 40-acre parcel by means of the erroneous inclusion of the legal description of the 40-acre parcel in the Personal Representative's Deed, as the Estate did not own the parcel at the time of the transfer. Therefore, the Trial Court granted Plaintiffs' Petition to remove the cloud on the title of the 40-acre parcel and to reform the Personal Representative's Deed to include only the real property which the Estate owned and had intended to convey. The Trial Court's Order was entered on October 24, 2003. No damages were awarded. The Trial Court took the Plaintiffs' request for sanctions under advisement.

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Both parties agreed in their Pre-Trial Statements that the issue of sanctions could be decided by the Court based on their written Statements. The Order awarding attorney fees and costs as sanctions was entered on April 15, 2004.

The Defendants failed to file a timely appeal by right from the October 24, 2003, Order on the substantive question of whether or not the Personal Representative's Deed should be reformed to remove the property which was not owned by the Decedent's Estate. The untimely Claim of Appeal was dismissed on June 10, 2004, and Defendants' Application for Leave to Appeal - Late Appeal, was dismissed on October 14, 2004. Defendants' Motion for Reconsideration was denied on November 18, 2004.

Defendants did not file an Application for Leave to Appeal to the Supreme Court with regard to the Trial Court's October 24, 2003 Order.

Defendants appealed the Trial Court's Order for sanctions and the Court of Appeals unanimously affirmed the Trial Court Order on December 1, 2005.

Defendants' Motion for Reconsideration was denied by a 2 to 1 decision on February 7, 2006.

Again, the Defendants have never filed an Application for Leave to Appeal the Trial Court decision with regard to the real property transfer which is at issue. The current Application for Leave to Appeal applies only to the Trial Court's award of sanctions.

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ARGUMENT

I. WHETHER ANY OF THE MICHIGAN AUTHORITY DEFENDANTS ASSERTED BELOW SUPPORTED THEIR POSITION THAT THEY WERE ENTITLED TO THE DISPUTED 40-ACRE PARCEL OF FARMLAND.

A. The Defendants quoted the following Michigan cases in the Trial Court:

1. *Schmaltzriedt v Titsworth*, 305 Mich 109; 9 NW2d 24 (1943). In *Schmaltzriedt* the grantors conveyed two parcels to their daughters, reserving a life estate only, and then decided that this was not what they wanted to do. The deed was upheld by the Court. Unlike the present case, the grantors in *Schmaltzriedt* owned the land that they conveyed, and intended to convey it.

2. *Christensen v Christensen*, 126 Mich App 640; 337 NW2d 611 (1983). A deed was upheld by the Court in *Christensen* even though the grantor later claimed he had not read the deed. However, the Grantor in *Christensen* was the owner of the real property transferred by the deed. Whereas, in the instant case, the Grantor, the Estate of David A. Spitzley, was not the owner of the 40-acre parcel which was erroneously included in the Personal Representative's Deed.

3. *Thomas v Steuernol*, 185 Mich App 148; 460 NW2d 577 (1990). *Thomas* held that a deed should be strictly construed against the grantor in order to convey to the grantee the greatest estate that the deed's terms will permit. Unlike *Thomas*, the current proceeding involves property which was not owned by the Decedent's Estate and could not be conveyed by the Personal Representative's Deed. *Thomas* is not relevant to the current proceeding because *Thomas* involved property which was owned by the grantor and therefore could be conveyed by him.

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4. *UAW-GM Human Resources BPR v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). In *UAW-GM*, the Court held that the language which could be interpreted in two ways was ambiguous. This ruling is not relevant to the current proceeding. The legal description in the Personal Representative's Deed in the current proceeding was not ambiguous, but instead it contained an erroneous legal description which the Co-Personal Representatives did not intend to convey and which was not owned by the Decedent's Estate.

5. *Tepsich v Howe Const Co*, 373 Mich 404, 407; 129 NW2d 398 (1964) on REH 377 Mich 18; 138 NW2d 376 (1965). The Court in *Tepsich* held that the legal affect of a deed cannot be contradicted by parole evidence. In the instant proceeding, the legal affect of the Personal Representative's Deed was to attempt to convey property not titled in the name of the Estate. The Defendants have attempted to use parole evidence of statements made by others to support the inclusion of additional property not owned by the Estate.

6. *Bennett v Eisen*, 64 Mich App 241, 244; 235 NW2d 749 (1975). The Court in *Bennett* held that parole evidence could be admitted to reform a deed in the case of fraud or mutual mistake. In the current proceeding, the third party drafter of the Deed mistakenly included property that was not titled to the Estate. If parole evidence was admitted in the current proceeding, the Defendants' initial Offer to Purchase clearly supported the intent to purchase only property owned by the Decedent's Estate.

7. *Burns v Caskey,* 100 Mich 94, 100-101; 58 NW2d 642 (1894); and *Youell v Allen*, 18 Mich 107, 109 (1869). Both of the above cited cases held that the burden of establishing mutual mistake was on the parties seeking reformation. Plaintiffs in this case recognize that they had the burden of proof in this matter. However, Plaintiffs in this case submit that these two cases do not support the Defendants position, but merely outline what the burden of proof is in

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a case of mutual mistake. It has been Plaintiffs' position throughout that since the Decedent's Estate did not own the 40-acre parcel of property in question, it could not make a legal conveyance of the property to the Defendants. An examination of the Personal Representative's Deed in this case clearly indicates that the Estate attempted to make a conveyance that it had no legal right to do.

8. *Bugariu v Bugariu*, 8 Mich App 673; 155 NW2d 244 (1967); and *Rupe v Cingros*, 7 Mich App 146; (1967). In *Bugariu* and *Rupe*, the Court held that parties wishing to reform a deed must produce "clear evidence of a mistake" in order to do so. Plaintiffs submit that this case does not support the Defendants' position, but instead supports Plaintiffs' position. Plaintiffs produced clear evidence of the mutual mistake when they offered the recorded copy of the Personal Representative's Deed as referred to previously as well as the Quit Claim Deed and Affidavit of the Decedent, which conveyed the 40-acres from the Decedent to the Decedent and the Decedent's son, Michael Spitzley.

9. *Kouri v Fassone*, 370 Mich 223; 121 NW2d 432 (1963). In *Kouri*, the Court held that mental incapacity was insufficient grounds to defeat a conveyance. This case has no relevance to the current proceeding.

10. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574; 458 NW2d 659 (1990). *Schmude* held that in order to apply the parole evidence rule, the Court must find that the parties intended a written instrument to be a complete expression of their agreement. In the current case, no parole evidence was needed. Therefore, this case is not relevant. The Personal Representative's Deed was complete on its face and the Grantors' intent was to transfer property owned by the Estate. The inclusion of the 40-acre parcel in the Deed was clearly a drafting error as it was not owned by the Estate.

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11. *Windsor Steel Products, Ltd v Whizzer Industries, Inc*, 157 F Supp 284 (1958). The Court in *Windsor Steel Products* held that the parole evidence rule did not bar the use of oral evidence to show the true agreement if it appears that no written integration of the entire transaction exists. Again, parole evidence is not needed in this case as it is clear from the Personal Representative's Deed that the Estate only sought to make a conveyance of property owned by the Estate. The 40-acres in question was not owned by the Estate, it was clearly a drafter's error to include the 40-acre parcel in the Deed.

12. *Price v National Union Fire Ins Co*, 294 Mich 289; 293 NW 652 (1940). *Price* held that when the owner of property executes a deed it is valid even if the owner uses a fictitious name. This case is totally irrelevant. No party sought to use a fictitious name and there is no claim that any party sought to do so.

13. *Franklin v Franklin*, 354 Mich 543; 93 NW2d 321 (1959). *Franklin* held that where a deed was signed as husband and wife and the woman knew she was not the wife, the deed was still valid. In the current case, Michael Spitzley was the Co-Personal Representative of the Estate, and could only convey Estate property, regardless of a drafting error by a third party. There was never any intent to convey the 40-acre parcel, which the Estate did not own. This case has no relevance. In *Franklin*, they were concerned about whether a party was misrepresenting the status of herself, while in the instant case, the Grantors of the Deed clearly executed the Deed as Co-Personal Representatives of the Estate only. There was never any indication in the Deed that the Grantors were executing the Deed to make a personal conveyance of property that they personally owned as opposed to property owned by the Estate.

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II. WHETHER THE NON-MICHIGAN AUTHORITY ON WHICH DEFENDANTS RELIED IN THEIR COUNTER-COMPLAINT PRESENT A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW, MCR 2.114(D).

The Defendants quoted the following non-Michigan cases to the Trial Court, all of which, Plaintiffs do not believe are relevant to this case, and certainly do not provide a good faith argument to reverse existing Michigan law.

1. *Bliss v Tidrick*, 25 SD 533; 127 NW 852 (1910). In *Bliss*, the Court ruled that when an estate administratrix conveyed estate property for value, a personal creditor of the administratrix could not later challenge the transfer. Unlike the present proceeding, the property in *Bliss* was titled in the name of the decedent's estate and the one-third life interest of the administratrix was not of record. In the current proceeding, the Decedent's Estate has never held record title to the 40-acre parcel which passed to a third party, being Decedent's son, Michael Spitzley, upon the Decedent's death.

2. *Langley v Conlan*, 212 Mass 135; 98 NE 1064 (1912). In *Langley*, the testamentary trustee mortgaged estate property, kept the funds, and then later attempted to devise the estate property through her will. The Court upheld the rights of the mortgagee to enforce the terms of the mortgage against the collateral. Like the prior case, there was no record title of the trustee as an individual in the real property, and the estate clearly held title at the time the trustee entered into the mortgage on behalf of the estate.

3. *Ford v Warner*, 176 SW 885 (1915). In *Ford*, agent Warner transferred parcel X on behalf of his principal to B. Later, agent Warner was fraudulently induced to transfer the same parcel X to C, and signed the deed in error. B later transferred parcel X to agent Warner. The court upheld the right of agent Warner to the parcel, holding that the estate could not transfer

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property which it no longer owned to party C. The ruling of the Court in *Ford* supports Plaintiffs' position, and not the Defendants' position, because the Deed from agent Warner to party C was signed in error, and the agent did not intend to convey property which his principal did not own.

4. *Mountain Home Lumber Company, Ltd v DR Swartwout*, 30 Idaho 559; 166 P 271 (1917). In *Mountain Home*, the corporate officer fraudulently conveyed property he knew the company did not own, and then later took a conveyance of the parcel to himself, personally. The Court awarded title to the innocent purchaser from the corporation. The *Mountain Home* case is not relevant. The grantor knew that his principal did not have title in the property and still sought to convey it to the third party.

5. *Brock v Rogers,* 184 Mass 545; 69 NE 334 (1904). In *Brock*, the Court upheld the title of the purchasers who bought from a guardian of her ward's estate when the guardian later claimed title as the heir to her deceased ward. *Brock* is not relevant to the current proceeding because the guardian intended to convey property which was owned by the ward's estate.

6. *Surtees v Hobson,* 13 SW2d 345 (1928). In *Surtees,* the Court upheld the rights of a mineral rights lessee to mineral rights on the lease executed by a guardian on behalf of his wards. When the guardian later tried to claim an additional one-third interest in royalties for himself, the Court refused to recognize this. *Surtees* is not relevant to the current proceeding because there was an intent to convey by the guardian and the ward's estate did own the property at the time of the conveyance.

7. *Crump v Sanders,* 173 SW 559; Tex Civ App (1915). In *Crump*, the Court upheld the rights of purchasers from the trustees of land owned by their principal, against an adverse possession claim by one of the trustees at a later date. *Crump* is not relevant to the

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current proceeding because the trustees in *Crump* did intend to convey the described property which was owned by the trust estate.

8. *Cox v Gutman,* 575 SW2d 661; Tex Civ App (1978). In *Cox*, a grantee of a one-half of a one-eighth oil royalty from a receiver was not allowed to claim more than the grantor actually held. This case does not support the Defendants' position, but instead supports Plaintiffs' position, i.e. that Grantor cannot convey property it did not own.

9. *Black v Beagle*, 59 Wyo 268; 139 P 2d 439 (1943). In *Black*, the Court upheld the title of purchasers from an estate administrator against his claim that the deed he signed should be void, because one of the purchasers had died. *Black* is not relevant to the instant proceeding for the reason that the estate administrator in *Black* did intend to convey the property, and the property was owned by the estate.

10. *Rutherford v McGee*, 241 SW 629 (1922). *Rutherford* was another case where a guardian sold property of his ward, with full warranty, and later attempted and failed to claim a one-third interest in the transferred property for himself. Like the prior cases, *Rutherford* is not relevant as there was an intent by the guardian to convey property which was owned by the ward's estate.

11. *Edwards v Sarasota Venice Co*, 246 F 773 (1917). In *Edwards*, the Court upheld the title of purchasers to a parcel transferred by a corporate president on behalf of the corporation against the claim of the corporate officer who had personally purchased the parcel and related acres at a tax sale prior to the conveyance. *Edwards* is irrelevant for the reason that the corporate officer fraudulently intended to convey property, knowing that it was not property of the corporate estate.

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12. *Wells v Steckelberg*, 52 Neb 597; 72 NW 865 (1897). *Wells* is one more case where a guardian sold property for a ward's estate, without reservation, and the Court refused to allow the guardian to later claim a one-third life interest in the property. *Wells* is not relevant because the fiduciary did intend to convey the property which was owned by the estate.

13. *Jacksonville Public Service Corporation v Calhoun Water Co*, 219 Ala 616; 123 So 79 (1929). The court in *Jacksonville* ruled that when a corporate officer transferred personal property plus a dam and reservoir, pursuant to a deed which clearly stated, " But the ground on which said building is located is not sold", the grantee could not later claim a permanent easement over the land. The *Jacksonville* case is not relevant because the deed did not attempt to convey that portion of the property which was not owned by the corporate principal.

14. *Millican v McNeill*, 102 Tex 189; 114 SW 106 (1908). In *Millican*, an administrator transferred estate property by warranty deed. The Court held that even though a legal technicality rendered the deed void, the claim of the purchasers would be upheld. *Millican* is not relevant to the current proceeding because there was an intent to convey by the administrator in *Millican* and the *Millican* estate was the owner of the property which the agent attempted to convey.

15. The Defendants' further cite 28 Am Jur 2nd, § 12 Estoppel and Waiver, which references situations where estoppel has been used to create title to real property. Defendants have asked the Court to create new Michigan law in order to hold that Co-Personal Representative Michael Spitzley should be estopped from asserting that the Personal Representative's Deed did not intend to convey the 40-acre parcel which was not titled in the

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name of the Estate and which had been previously conveyed to Michael Spitzley by his father, the Decedent.

Michigan law does not provide for transfer of real property by estoppel. Michigan law on this question is clearly stated in *Kirchen v Remenga*, 291 Mich 94, 110 NW 344 (1939):

"The title to land may not, under the law of this State, rest on estoppel",

and in *Kitchen v Kitchen*, 465 Mich 654, 660; 641 NW2d 245 (2002):

> "Our case law indicates that a interest in land cannot be established on the basis of estoppel, as plaintiffs seek to do. We stated in *Huyck v Bailey*, 100 Mich 223, 226; 58 NW 1002 (1894): 'The statute of frauds prevents the passing of title to realty by parole, and this cannot be done any more under the guise of an estoppel, in the absence of fraud . . . "

None of the above non-Michigan authority on which the Defendants relied in their Counter-Complaint presents a good faith argument for the extension, modification, or reversal of this existing Michigan law.

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III. WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT "DEFENDANTS HAVE NOT PRESENTED . . . ANY DOCUMENTARY EVIDENCE THAT SUPPORTS THEIR POSITION".

The Defendants submitted the Personal Representative's Deed to support their position that they should be awarded record title to the 40-acre parcel. Plaintiff submits that none of the documents submitted by the Defendants support their position in that regard.

Personal Representative's Deed. The Defendants have alleged repeatedly that the Deed was prepared by the Plaintiffs' agent, or by the Plaintiffs' counsel, even though the Deed itself clearly states to the contrary. The second page of the Personal Representative's Deed, (see **Exhibit 1),** contains the following disclaimer:

> "DRAFTER HAS NOT EXAMINED AND MAKES NO REPRESENTATIONS RESPECTING SURVEY, TITLE TO THE PROPERTY, OR THE LAND DIVISION ACT. Nations Title requested the drafter to prepare this document. The drafter does not represent any party affected by this document. The drafter encourages all parties to have legal documents reviewed by counsel." *(Emphasis added)*

In addition to the above-quoted disclaimer, it is clear from the Personal Representative's Deed that the Grantors were Personal Representatives acting on behalf of the Estate of David Spitzley and only in their representative capacity.

It is also clear from reading the Personal Representative's Deed that the Deed contains no warranties of any kind, and clearly intends only to convey property owned by the Estate of David Spitzley.

Nothing contained in the Deed suggests that either of the Personal Representatives intended to convey property owned by them individually.

The Personal Representative's Deed also indicates that the conveyance was exempt from Michigan State Transfer Tax pursuant to MCL 207.526, SEC. 6(j). Section (j) provides for

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exemption from State transfer tax when a parcel is conveyed from an individual to that individual's child, step-child, or adopted child. This exemption would not have applied to the 40-acre parcel, which would not have been a conveyance from an individual to a child. Defendant Thomas Spitzley was the child of the Decedent, David A. Spitzley, and the brother of Michael Spitzley. A transaction from Michael Spitzley to Defendant Thomas Spitzley would not have been exempt from State Transfer Tax as it would have been a transfer between siblings rather then a transfer between a father and child.

Quit Claim Deed. The Defendants also submitted a copy of the recorded Quit Claim Deed, (see **Exhibit 2)**, executed by David A. Spitzley to David A. Spitzley and Michael Francis Spitzley, as joint tenants with full rights of survivorship. It is clear from this submission that Defendants were aware that the 40-acre parcel had been previously quit claimed by the Decedent to himself and his son, Michael Francis Spitzley, as joint tenants, and that the parcel was not owned by the Decedent's Estate.

It is also clear that the aforesaid Quit Claim Deed was recorded on December 26, 2001, nearly eleven months prior to the drafting and execution of the Personal Representative's Deed. Therefore, the Defendants had record title notice of the existence of the Deed and of Michael Spitzley's individual ownership of the real property described in the Deed.

Mortgage. The Defendants' submitted a document entitled "Mortgage", (see **Exhibit 3)**, which was apparently the first page of a mortgage drafted by Novastar Mortgage, Inc., and was labeled "Page 1 of 6". This document was dated November 14, 2002, the same date as the execution of the Personal Representative's Deed.

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The alleged mortgage did not have the signature of anyone representing the Estate nor was it executed by Michael Spitzley. If the exhibit is at all relevant, it fails to support the Defendants' position, as it was never approved by the Plaintiffs.

Last Will and Testament. The Defendants also submitted a copy of the Last Will and Testament of David A. Spitzley, (see **Exhibit 4).** The terms of the Will indicate that Mr. Spitzley executed this document on July 30, 1998, which was nearly two years prior to the Decedent's execution of the Quit Claim Deed **(Exhibit 2)** for the 40-acre parcel from the Decedent to the Decedent and the Decedent's son, Michael Francis Spitzley. Therefore, the terms of the Will could not legally limit the effect of the Quit Claim Deed to transfer the 40-acre parcel to Michael Francis Spitzley as survivor of himself and the Decedent, David A. Spitzley.

Attorney Kasenow letter. The next document submitted by the Defendants was a copy of a letter from Attorney Gary M. Kasenow, (see **Exhibit 5)**, who was the initial attorney hired to represent the Estate. The letter appears to be based entirely on the assumption that all of the Decedent's real estate would be probated pursuant to the Will. Nothing in the letter implies that Michael Spitzley had offered to transfer the 40-acre parcel which had already been transferred to him by operation of law upon the death of the Decedent. This document does not support the position of the Defendants.

Defendants' Attorney's letter dated May 13, 2003. The letter from Defendants' attorney, dated May 13, 2003, was directed to one of the Plaintiffs, Michael Spitzley, (see **Exhibit 6**). This letter advises Mr. Spitzley that the Defendants expect him to remove personal property from the pole barn which was located on the 40-acre parcel and advises him that Defendant Thomas Spitzley would consider Michael Spitzley's personal property to be abandoned if it was not removed within 30 days. This letter by Defendants' attorney is self-serving, and would not be admissible

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in any court proceedings. Furthermore, it does not support their position with regards to ownership of the property.

The Defendants' Attorney's letter dated May 23, 2003. The Defendants next exhibit is a copy of a second letter from Attorney Faraone dated May 23, 2003. (see **Exhibit 7**). This letter responds to the Plaintiffs' second attorney that Defendants' attorney does not believe that the effect of the Deeds referenced by Mr. Jackson's letter should have any effect other than to transfer both Estate property and Michael Spitzley's personal property to the Defendants herein. The letter does state,

> "They purchased the property from the Estate, the title was researched, Michael Spitzley's name is on the Deed." (*Emphasis added*).

This letter is not relevant nor would it be admissible at a trial in the above matter. This letter is self-serving, and is an attempt by the Defendants' attorney to bootstrap themselves into an ownership position of the property of which the Estate had no right to make a conveyance. Further, the above cited quotation makes clear that the Defendants' attorney was well aware that the 40-acre parcel was not property of the Estate at the time of conveyance, but instead, was owned by the Plaintiff, Michael Spitzley, individually.

Three Affidavits of Third Parties. The Defendants also submitted the Affidavits of various third parties which are as follows:

1. Affidavit of a Cameron Chapin on behalf of "Fairway of America", concerning information provided by the Defendants in their application for mortgage;
2. Affidavit by Mark Spitzley, another sibling, with reference to oral statements the affiant recalled; and

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3. Affidavit of another sibling, Kimberly Spitzley, which indicated that she was unaware of any of the negotiations and had no knowledge regarding the sale of the 212 West Oak Street property.

None of the Affidavits support the position of the Defendants. A copy of the three Affidavits are attached as **Exhibits 8, 9 and 10**.

Purchase Agreement. The Defendants also provided a one-page document entitled PURCHASE AGREEMENT. This document indicates that the Defendants agreed to purchase the property at 212 West Oak Street for $78,000.00, contingent upon the sale of their home in Grand Ledge, "[F]rom the Estate of David A. Spitzley". (*Emphasis added*). This alleged Purchase Agreement has three lines and no signatures and does not support their position. A copy of this document is attached hereto as Plaintiff's **Exhibit 11**.

Copy of Plaintiffs' Attorney's letter dated November 12, 2002. The next document submitted is a copy of a letter from Attorney William Jackson, the second Estate attorney. This letter is clearly dated November 12, 2002, which is two days prior to the execution of the Personal Representative's Deed, contrary to numerous assertions by the Defendants to the contrary. This letter advises the beneficiaries that there were errors in the prior letter from Attorney Kasenow with regard to the legal effect of other documents which were reviewed in addition to the 1998 Will. The letter also clarifies that the 40-acre farm property was deeded by the Decedent to himself and Michael Spitzley as joint tenants with full rights of survivorship, and enclosed a copy of that Deed. This document does not in any way support the Defendants' position. A copy of Attorney William Jackson's November 12, 2002, letter is attached hereto as Plaintiff's **Exhibit 12**.

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Water bill. The Defendants also submitted a copy of a water bill for 2/24/03 - 5/22/03. This water bill indicates that it is for residential service at 212 West Oak Street. The bill was sent to Thomas P. Spitzley at 212 West Oak Street, Westphalia, Michigan. Apparently, the Defendants allege that the $16.00 labeled "flat fee" was for the spigot at the pole barn located on the farm property. A copy of the water bill is attached hereto as Plaintiff's **Exhibit 13**. No receipt for any payment of this bill was submitted. However, even if the Defendants had paid $16.00 for this, the effect would clearly be *de minimus*, and insufficient to support their clam.

Summer Tax Bills. The Defendants also submitted a copy of two 2003 summer tax bills directed to them for the parcel which describes the 40-acres. There is no receipt for payment and exhibits submitted by the Plaintiffs with their Motion for Summary Disposition confirmed, from the testimony of one of the Defendants, that the Defendants did not pay any property tax bills for the subject parcel. These summer tax bills do not support the Defendants. A copy of these tax bills are attached hereto as Plaintiff's **Exhibit 14 and 15**.

Tax Bill. The Defendants also submitted a tax bill for the property which they did purchase. A copy of this tax bill is attached hereto as Plaintiff's **Exhibit 16.**

Notice of Apportionment. Defendants also submitted a notice of a review of apportionment for the Stoney Creek Drain which appears to apply to a 41.20 acre parcel. The estimated assessment amount was $4.00. Once again, even if the Defendants had actually had to pay this assessment, which they did not, this payment would clearly have been *de minimus* and not supportive of their position. A copy of the notice of a review of apportionment is attached hereto as Plaintiff's **Exhibit 17.**

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A review of the documents submitted in the Lower Court by the Defendants clearly supports the ruling of the Circuit Court that, "Defendants had not presented . . . any documentary evidence that supports their position".

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IV. WHETHER SANCTIONS WERE PROPERLY AWARDED AGAINST DEFENDANTS PURSUANT TO MCR 2.114(E).

The Plaintiffs herein submit to this Honorable Court that the sanctions awarded against the Defendants by the Trial Court were awarded properly for the following reasons:

1. The Estate of David A. Spitzley never owned the 40-acre parcel and could not have transferred it pursuant to a Personal Representative's Deed.

2. As soon as Michael Spitzley learned that the Defendants were claiming an interest in the 40-acre parcel, the Plaintiffs' attorney wrote to the Defendants' attorney explaining that the non-Estate property could not have been transferred by the Personal Representative's Deed and that there was never any document which purported to add the additional parcel to the original Estate property which the Defendants proposed to purchase.

3. The Defendants acknowledged that a title search had been conducted and that they were aware that the Decedent had quit claimed the 40-acre parcel to himself and Michael Francis Spitzley and that the Quit Claim Deed was recorded on December 26, 2001. Therefore, Defendants were aware that the 40-acre parcel was not estate property.

4. In addition to the documentation provided by the Defendants, the Trial Court had additional documentation provided by the Plaintiffs. This documentation included the Purchase Proposal from the Defendants submitted on May 31, 2001. On Page 5 of the Proposal, the Defendants clearly indicate that they are planning to build a garage, "[A]s the pole barn is no longer part of the house property." Obviously, the Defendants were aware that the pole barn on the 40-acre parcel was not part of the purchase. A copy of the May 31, 2001 Offer to Purchase is attached hereto as Plaintiff's **Exhibit 18**.

5. A copy of the letter from Attorney William G. Jackson to Attorney Faraone dated May 22, 2003 is attached as Plaintiff's **Exhibit 19**.

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6. The Plaintiff also submitted a partial copy of transcripts of the depositions of the Defendants' as Exhibit R to Plaintiffs' Brief in Support of Motion for Summary Disposition. A copy of the relevant pages of the transcript of the Deposition of Kimberly S. Spitzley are attached hereto as Plaintiff's **Exhibit 20**.

The transcript provided, in part, testimony from Defendant Kimberly Spitzley, wherein she acknowledged that Michael Spitzley never gave the Defendants anything in writing from himself personally indicating that he wished to convey to the Defendants any interest he had in the 40-acres and pole barn. (Trans., Dep Kimberly S. Spitzley, July 9, 2003, Page 27)

Defendant Kimberly S. Spitzley also indicated that they had just received their tax bill for July, 2003, and that this was their first tax bill since closing. The Defendant Kimberly S. Spitzley confirmed that they had not paid that tax bill. (Trans., Dep Kimberly S. Spitzley, July 9, Page 28)

7. The exhibit provided by the Plaintiffs consisting of transcripts of the depositions of the Defendants also included the statement of Defendant Kimberly S. Spitzley wherein she agreed that the second Purchase Agreement referred again to the property at 212 West Oak Street, Westphalia, Michigan, and contained no additional language purporting to add the additional 40-acre parcel. (Trans., Dep Kimberly Spitzley, July 9, Page 10).

8. In the transcript, Kimberly S. Spitzley also indicated that the Defendants had lived in the Decedent's home at 212 West Oak Street, Westphalia, Michigan, from May of 2001 through the closing on the Personal Representative's Deed and, that they were paying $60.00 per month plus utilities for rent during this time. (Trans., Dep Kimberly Spitzley, July 9, Page 27)

It should be noted that the $60.00 per month plus utilities is the same $60.00 per month plus utilities that Defendants claimed they were paying on the mortgage for both parcels.

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The Defendants failed to provide any support for their position that the Estate of David Spitzley could have transferred property not titled in the Estate or that there was ever any intention on the part of the Estate Representatives to do so.

Nevertheless, the Defendants continued to refuse to cooperate in the reformation of the erroneous Personal Representative's Deed and forced the Plaintiffs to incur additional attorney fees by their opposition to this request.

Wherefore, Plaintiffs pray as follows:

1. That the Trial Court's Order with regards to the imposition of sanctions pursuant to MCR 2.114(E) be affirmed;
2. That this Court impose further attorney fees and costs on Defendants and their Attorney as sanctions for continuing the advocacy of their frivolous and unmeritorious position on appeal before this Honorable Court.

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RELIEF REQUESTED

Plaintiffs request that this Honorable Court deny the Application for Leave to Appeal, affirm the Trial Court Order for Sanctions and award attorney fees and costs incurred by Plaintiffs in the appeal to this Court.

Respectfully submitted,

WILLIAM G. JACKSON, P.C.

Dated: July 13, 2006

By: Roberta L. Ballard
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